

**FEDERAL ELECTION COMMISSION**  
999 E Street, N.W.  
Washington, D.C. 20463

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**FIRST GENERAL COUNSEL'S REPORT**

**SENSITIVE**

RE: MUR 4840  
DATE COMPLAINT FILED: 10/23/98  
DATE OF NOTIFICATION: 11/02/98  
DATE ACTIVATED: 7/10/00

EXPIRATION OF STATUE OF  
LIMITATIONS: 7/28/03  
STAFF MEMBER: Matt Hardy

**COMPLAINANT:**

Phil Perington, Chair, Colorado Democratic Party

**RESPONDENTS:**

Centennial Spirit  
Donald Bain of Centennial Spirit  
Natalie Meyer of Centennial Spirit  
Mike Hesse  
Congressman Scott McInnis  
Campbell Victory Fund and Arron L. Clark, as Treasurer  
Bob Greenlee for Congress Committee and Clair Ann Beckmann, as Treasurer  
Friends of Scott McInnis and Dennis King, as Treasurer  
Bob Schaffer for Congress and Arthur R. Willis II, as Treasurer  
Hefley for Congress and Fredrick R. Reynolds, as Treasurer  
Tancredo for Congress Committee and Raymond Gifford, as Treasurer  
Nancy McClanahan Goes to Congress and Janice C. Perkins, as Treasurer

**RELEVANT STATUTES:**

2 U.S.C. § 441b  
2 U.S.C. § 433  
2 U.S.C. § 434  
2 U.S.C. § 441a(a)(1)(C)  
2 U.S.C. § 441a(a)(1)(A)  
2 U.S.C. § 441a(f)  
2 U.S.C. § 441d  
11 C.F.R. § 100.22  
11 C.F.R. § 110.11(a)(5)

23-04-406-1203

INTERNAL REPORTS CHECKED: Disclosure Reports  
Contributor Indices

FEDERAL AGENCIES CHECKED: None

**I. GENERATION OF MATTER**

This matter was generated by a complaint submitted by Phil Perington, Chair of the Colorado Democratic Party ("Complainant"), alleging violations of the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), by Centennial Spirit, a Colorado non-profit corporation. In addition to Centennial Spirit, respondents also include two officers of Centennial Spirit, one contractor, Congressman Scott McInnis and seven federal Republican campaign committees and their treasurers.

## II. FACTUAL AND LEGAL ANALYSIS

### A. The Applicable Law

#### 1. Raising and Expending Corporate Funds for Express Advocacy

##### a. Section 441(b)

Section 441b(a) of the Act generally prohibits corporations from using general treasury funds to make a contribution or expenditure, including an independent expenditure,<sup>1</sup> in connection with federal elections. Furthermore, the Act prohibits any candidate, political committee or other person from knowingly accepting or receiving, and any officer or director of any corporation from consenting to, any such contribution or expenditure. 2 U.S.C. §441b(a).

However, in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), the Supreme Court held, *inter alia*, that section 441b's prohibition of independent expenditures from a corporation's general treasury funds cannot be applied constitutionally to a "class of organizations" that, although corporate in form, do not present the dangers that section 441b is designed to prevent. The Court determined that such organizations must have three distinct features. First, the corporation must have been "formed for the express purpose of promoting political ideas, and cannot engage in business activities." *MCFL*, 479 U.S. at 264. Second, the corporation must not have "shareholders or other persons affiliated so as to have a claim on its assets or earnings." *Id.* Finally, the corporation must not have been "established by a business corporation or a labor union, and [must have] in place a policy not to accept contributions from such entities." *Id.*

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<sup>1</sup> The term expenditure includes any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office. 2 U.S.C. § 431(9) and 11 C.F.R. § 114.1(a)(1). Independent expenditures are expenditures made without the cooperation of or consultation with any candidate that finance communications expressly advocating the election or defeat of a clearly identified candidate. 2 U.S.C. § 431(17) and 11 C.F.R. § 100.16.

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In 1995, the Commission promulgated 11 C.F.R. § 114.10, implementing 2 U.S.C. § 441b in light of *MCFL*. This regulation sets forth five criteria that must be met by the entity in order to achieve the status of a "qualified nonprofit corporation." First, the corporation must have as its only express purpose the promotion of political ideas. 11 C.F.R. § 114.10(c)(1). Second, the corporation cannot engage in business activities. 11 C.F.R. § 114.10(c)(2). Third, the corporation must not have shareholders or other persons who are affiliated in such a way that they might be able to make a claim on the organization's assets or earnings; or have any persons who have been offered a benefit such that it would act as a disincentive for them to disassociate themselves from the corporation on the basis of a difference of opinion with the corporation on a political issue. 11 C.F.R. § 114.10(c)(3). Fourth, the corporation must not have been established by a business corporation or a labor organization, and must not accept contributions, directly or indirectly, from business corporations or labor organizations. 11 C.F.R. § 114.10(c)(4). Finally, the corporation must be described in 26 U.S.C. § 501(c)(4). 11 C.F.R. § 114.10(c)(5). In addition, qualified non-profit corporations that make independent expenditures in support or in opposition to a federal candidate aggregating in excess of two hundred and fifty dollars (\$250) in a calendar year must file reports with the FEC in accordance with 11 C.F.R. §§ 109.2 and 114.10(e)(2), and certify in writing to the Commission that they are in fact eligible for the exemption from the prohibitions against corporate expenditures. 11 C.F.R. § 114.11(e)(1).

**b. Express Advocacy**

In *MCFL*, the Supreme Court, relying on its earlier decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), ("*Buckley*") also held that the prohibition on corporate expenditures applies only to expenditures for communications that contain "express advocacy" of the election or defeat of clearly identified candidates for federal office. 479 U.S. at 249. The Court explained

that *Buckley* had "...adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." *Id.* "We therefore concluded *in that case* (emphasis added) that a finding of 'express advocacy' depended upon the use of language such as 'vote for,' 'elect,' 'support,' etc., *Buckley*, supra at 44, n.52." *Id.*

In *MCFL*, the Court analyzed both the focus and content of the MCFL newsletter to ascertain whether its overall "effect" was that of "discussion of issues" or "exhortation to vote for particular persons." The MCFL newsletter bore the headline on the first page "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," and stated that "[n]o pro-life candidate can win in November without your vote in September." "VOTE PRO-LIFE" was printed in large bold-faced print on the last page, next to which was a disclaimer: "This [newsletter] does not represent an endorsement of any particular candidate." A coupon was provided that could be taken to the polls to remind voters who the "pro-life" candidates were. In addition, the newsletter listed all the candidates running for election in Massachusetts and identified each as supporting or opposing certain issues, but featured pictures of only those candidates whose positions were consistent with those of *MCFL*. *Id.* at 243.

Based on these facts, the Court held that the newsletter contained "express advocacy":

The publication not only urges voters to vote for "pro-life" candidates, but also identifies and provides photographs of specific candidates fitting that description. The [newsletter] cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides *in effect an explicit directive* (emphasis added): vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature. The [newsletter] goes beyond issue advocacy to express electoral advocacy. The disclaimer cannot negate this fact.

*Id.* at 249.

The MCFL newsletter did not contain any of the so-called "magic words" of footnote 52 from *Buckley*; the Court nevertheless found that it did contain words which were "in effect" express advocacy. Although the newsletter in *MCFL* did list issues and contain some issue advocacy, the Court found that it crossed the line between issue advocacy and express advocacy by directing the attention of the reader/voter to the voting records and photos of those candidates who were singled out as "pro-life" and then exhorting them to "Vote Pro-life"—"in effect", an explicit directive to vote for the named pro-life candidates. This "in effect" test remains the only standard that the Supreme Court has promulgated for deciding when a publication becomes "express advocacy."

In *FEC v. Furgatch*, 807 F.2d 857, 862-864 (9<sup>th</sup> Cir.) *cert. denied*, 484 U.S. 850 (1987) ("*Furgatch*"), the Ninth Circuit offered a standard for "express advocacy" based upon the Supreme Court's ruling in *Buckley* and the lower court ruling in *MCFL*. (The decision did not discuss the Supreme Court's "in effect" standard from *MCFL*, however.) The case concerned a negative advertisement about President Carter placed three days before the 1980 general election. After criticizing President Carter, the advertisement stated, "If he succeeds the country will be burdened with four more years of incoherencies, ineptness, and illusion. . . ." The ad then concluded, "DON'T LET HIM DO IT." 807 F. 2d at 858.

The Ninth Circuit held that this advertisement contained express advocacy. In reaching its decision, the *Furgatch* court pointed out the fact that limiting a finding of express advocacy to speech that utilized the so-called "magic words" of *Buckley* "would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the Act."

*Id.* at 863. While conceding that *Buckley* did not draw a bright and unambiguous line on this issue, the court concluded that express advocacy includes any message that, "when read as a whole, and with limited reference to external events, [is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *Id.* at 864. The court then adopted a three part test:

First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some sort of action.

*Id.*

In 1995, the Commission promulgated 11 C.F.R. § 100.22 to provide guidance on the concept of express advocacy in accordance with judicial interpretations, including *Buckley*, *MCFL*, and *Furgatch*. The final rule, in its entirety states:

Expressly advocating means any communication that –

- (a) uses phrases such as "vote for the President," "re-elect your congressman," "support the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life," or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters or bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76", "Reagan/Bush," or "Mondale!"; or

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because-

- (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
- (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.<sup>2</sup>

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Recently, the issue of express advocacy in a corporate context was addressed by a federal court in the case of *FEC v. Christian Coalition*, 52 F.Supp. 2d 45 (D.C.D.C. 1999) ("*Christian Coalition*"). The court looked at several communications distributed by the Christian Coalition during the 1994 election cycle and found that one, a mailing issued by the Coalition's Georgia affiliate, contained express advocacy and therefore violated the prohibition on corporate expenditures. Basing its decision on prior case law, particularly *MCFL*, the court declared that, to be express advocacy, a communication must "in effect contain an explicit directive," which takes the form of an "action verb or its functional equivalent." *Id.* At 62. According to the *Christian Coalition* court, once the speaker and the content have been identified, a communication will be considered express advocacy only in those instances where a reasonable person would understand that the speech used, considered in the context of the entire communication, contained an explicit directive to take electoral action in support of the election or defeat of a clearly identified candidate. *Id.* at 62.

<sup>2</sup> Two appellate courts have determined that part (b) of this regulation is invalid. *Maine Right to Life v. FEC*, 98 F.3d 1 (1<sup>st</sup> Cir. 1996) and *FEC v. Christian Action Network*, 110 F.3d 1049 (4<sup>th</sup> Cir. 1997). On September 22, 1999, the Commission unanimously adopted a statement formalizing a pre-existing policy of not enforcing subsection (b) in the First and Fourth Circuits. In January 2000, a district court in Virginia issued a nationwide injunction preventing the Commission from enforcing 11 C.F.R. 100.22(b) anywhere in the country. *Virginia Society for Human Life, Inc. v. FEC*, 83 F.Supp.2d 668 (E.D. Va. 2000). The FEC has filed an appeal of the injunction. That appeal is pending.



The mailing at issue in the *Christian Coalition* case was distributed immediately prior to Georgia's July primary. Under the heading, "State Coalition Update – July 1994", the cover letter stated, in part:

The Primary elections are here! On Tuesday, July 19, Georgians will nominate Democratic and/or Republican candidates for the offices of: Governor, Lt. Governor, Insurance Commissioner, Congress, Public Service Commissioner and the State Legislature. To help you prepare for your trip to the voting booth, we have enclosed a complementary voter ID card. This personalized card lists your congressional district and your State House and State Senate districts. We have also enclosed a Congressional Scorecard which you may take to the voting booth. The only incumbent Congressman who has a Primary election is Congressman Newt Gingrich – a Christian Coalition 100 percenter. Make sure that you save this scorecard for November, however, because all other Congressmen are opposed in the General Election.

*Id.* at 58.

The court found that this mailing, which was clearly directed to the reader as voter, constituted express advocacy as it pertained to the candidacy of Newt Gingrich. While the enclosed scorecard did not overtly tell readers who they should vote for, the court found that the cover letter clearly promoted Congressman Gingrich's candidacy. Readers were specifically told that while the scorecard was for use in the voting booth, it really was not needed for the Congressional primary, because the only challenged incumbent was Newt Gingrich and he was a "100 percenter." Further, the court noted that while Mr. Gingrich's elevated standing with the Christian Coalition is explicitly highlighted, and while the recipients of the mailing are informed that the seat is contested, the opponent is never identified. The court found that "the unmistakable meaning of the letter is that because Newt Gingrich has voted as the Coalition would have wanted him to on every vote the Coalition considered significant, the reader should vote for him in the primary election." *Id.* at 65. Moreover, "[w]hile marginally less direct than

saying 'Vote for Newt Gingrich,' the letter in effect is explicit that the reader should enter the voting booth with the knowledge that Speaker Gingrich was a 'Christian Coalition 100 percenter' and therefore the reader should vote for him." *Id.* The court also noted that "while the 'express advocacy' standard is susceptible of circumvention by all manner of linguistic artifice, merely changing the verb 'vote' into the noun 'trip to the voting booth' is insufficient to escape the limited reach of 'express advocacy.'" *Id.*

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**3. Contribution Limits.**

Pursuant to 2 U.S.C. § 441a(a)(1)(C), no person shall make contributions to any political committee other than a candidate's authorized political committee, or a party committee, in a calendar year which, in the aggregate, exceed \$5,000. Pursuant to 2 U.S.C. § 441a(a)(3), no individual shall make contributions aggregating more than \$25,000 in any calendar year.

**4. Coordinated Expenditures.**

"Contribution" is defined by 2 U.S.C. §431(8)(a)(i) as, "(a)ny gift subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of

influencing any election for federal office." Pursuant to 2 U.S.C. § 441a(a)(1)(A), "(n)o person shall make contributions to any candidate and his authorized political committees with respect to any election for federal office which, in the aggregate, exceed \$1,000." Furthermore, it is illegal for any political committee to knowingly accept any contribution in violation of section 441a. 2 U.S.C. § 441a(f).

An expenditure remains an "independent expenditure" as defined by 2 U.S.C §431(17) only when it is "...made without cooperation or consultation with...and...not made in concert with or at the request or suggestion of any candidate, or any authorized committee or agent of such candidate." An expenditure made on behalf of a candidate or the candidate's committee which is not an independent expenditure is an in-kind contribution as defined in 2 U.S.C. §441(a)(7)(B)(i).

Recently, in *Christian Coalition, supra*, the court identified two ways in which "coordination" could occur. First, coordination occurs when "...expressive coordinated expenditures are made at the request or the suggestion of the candidate or an authorized agent." *Id.* at 91. Second, coordination occurs when "...the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience ( e.g. choice between newspaper or radio advertisement); or (4) 'volume' (e.g. number of copies of printed materials or frequency of media spots)." *Id.* at 92. The court went on to discuss the situation in which an individual worked both for a campaign and for an entity making the expenditures in question. The court held that such contacts alone, absent proof of discussion

or negotiation, would not be sufficient to establish coordination. *Id.* at 96-97. The Commission decided not to appeal this decision.<sup>5</sup>

<sup>5</sup> On November 30, 2000, the Commission approved a new rule on "coordination" among candidates, political parties and outside organizations. The rule will take effect this year, following a period of Congressional review.

**B. The Complaint**

The complaint in this matter is directed at Centennial Spirit, a Colorado nonprofit corporation incorporated on July 28, 1998. Many of the factual allegations in the complaint are based on eight Colorado newspaper articles (attached to the complaint), including the allegation that "[t]he formation of Centennial Spirit reflects a disturbing trend in Colorado in which Colorado Republicans have been systematically evading state and federal election laws by forming 'educational' corporations for the purpose of conducting Republican get-out-the-vote efforts with undisclosed, corporate funds."

Citing to attached news articles from the Rocky Mountain News, Complainant alleges that Centennial Spirit was organized by a former Chair of the Colorado Republican Party, Donald Bain, assisted by Congressman Scott McInnis and Mike Hesse. Natalie Meyer, former Colorado Republican Secretary of State, is reportedly Chairman of Centennial Spirit, and the organization reportedly had a budget of \$1 million in 1998. Again citing to an attached Rocky Mountain News article, Complainant alleges that "[t]he stated goal of these groups is to promote the GOP's legislative and statewide candidates and presumably federal candidates."

According to the Complainant, the Colorado Democratic Party, on October 19, 1998, obtained a Centennial Spirit direct mail advertisement (attached to the complaint). Complainant states that the Rocky Mountain News reported that 575,000 of the mailers were sent out statewide. Complainant alleges that the mailer, "exhorts the reader to vote for a listing of clearly identified federal and non-federal Colorado candidates...." To support this contention,

Complainant provides a narrative summation of the mailer's contents, including the provision of an absentee ballot application therein and a small-print disclaimer reading "Paid for by Centennial Spirit, a Colorado non-profit corporation."<sup>6</sup> According to the Complainant, "as evidenced by" the mailer, "Centennial Spirit's activities expressly advocate the election of Republican candidates, and based on information and belief, the activities of Centennial Spirit are 'coordinated' with Republican candidates and party committees."<sup>7</sup>

Third, Complainant maintains that "by presumably accepting contributions in excess of \$5,000," Centennial Spirit has also violated 2 U.S.C. § 441a(1)(C). Fourth, Complainant alleges that Centennial Spirit made contributions in excess of \$1,000 to at least six federal candidates in violation of 2 U.S.C. §§ 441a(a)(1)(A) and 441a(f) in connection with the mailer. This allegation is based on Complainant's conclusion that "[i]t is inconceivable that Centennial Spirit could have made any expenditure that was independent of any federal candidate," because, allegedly, a number of "seasoned Republican

<sup>6</sup> For a full description of the mail advertisement, see discussion at part II.D. *infra*.

<sup>7</sup> The Complaint also states, based on a newspaper article, that "on October 19, 1998, Centennial Spirit began running television advertisements that promote Republican candidates throughout the state. . . [that] are intended to run through election day." A review of transcripts obtained from public sources indicate that only state candidates were the subject of these advertisements, however.



operatives" and "party regulars" were involved in operating Centennial Spirit, Congressman Scott McInnis was reportedly raising funds for the organization, and McInnis' picture, as well as professional photographs of every other Colorado Republican federal candidate, appear in the mailer "that is the basis of this complaint."

**C. The Responses**

Respondents Centennial Spirit, Donald Bain, Scott McInnis and Friends of Scott McInnis, Michael Hesse, Natalie Meyer, Bob Greenlee for Congress, Bob Schaffer for Congress, and Tancredo for Congress Committee, all responded separately, by sworn affidavits, to the complaint. The Campbell Victory Fund, Hefley for Congress and Nancy McClanahan Goes to Congress each responded by unsworn letter.

Donald Bain responded on behalf of Centennial Spirit. He states that Centennial Spirit is a Colorado non-profit corporation, "organized exclusively for educational purposes," that is not permitted to "advocate the election or defeat of any candidate for public office," as set forth in its Articles of Incorporation attached to the complaint. According to Mr. Bain, Centennial Spirit has not claimed any exemption from federal income taxation pursuant to Section 501(c) of the Internal Revenue Code. He identifies himself as Secretary-Treasurer of Centennial Spirit, Natalie Meyer as President and Chairman, and Michael Hesse as a contract consultant to the organization. Mr. Bain avers that Congressman McInnis holds no position with Centennial Spirit, and while assisting in raising funds for it, "did not cooperate or consult with Centennial Spirit concerning its program or its disbursements and no disbursements were made by Centennial Spirit in concert with or at the request or suggestion of Congressman McInnis."

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Finally, Mr. Bain discusses Complainant's "coordination" allegations. He avers that "[t]he mailer was not prepared, paid for or mailed in cooperation or consultation with any candidate or candidate committee and was not prepared, paid for or mailed in concert with, or at the request or suggestion of, any candidate or candidate committee." Moreover, according to Mr. Bain, everyone associated with Centennial Spirit was told orally and in writing that "Centennial Spirit was not permitted to engage in express advocacy and that its disbursements were not to be made in cooperation or consultation with any candidate or candidate committee."<sup>8</sup> Centennial Spirit's response does not specifically address Complainant's allegations that Centennial Spirit

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<sup>8</sup> The written admonition, dated September 10, 1998, is attached to the response. Mr. Bain additionally states that the statutory standard of "coordination" is too vague, and should not be applied until the conclusion of the Commission's pending rulemaking.

received or disbursed corporate funds in violation of 2 U.S.C. § 441b, nor does its Articles of Incorporation contain any expression of a policy against such activities.

The sworn responses of Natalie Meyer, Michael Hesse, and Donald Bain each aver (with slight variations in wording) that "to the best of my information and belief, [Centennial Spirit's response to the complaint] is true and accurate."

Scott McInnis' response states that he was elected to Congress from the Third District of Colorado in 1998. He avers that he has never been an officer or director of Centennial Spirit, that he assisted the organization in raising funds for educational programs because he believes in its purposes and understood that it would not engage in express advocacy. Further, Mr. McInnis states that he did not participate in developing Centennial Spirit's educational program. Nor did he "cooperate or consult with them or make any requests or suggestions to them concerning their disbursements." Finally, Mr. McInnis avers that "I was not informed in advance that my picture would appear, along with other candidates, in a mailer distributed by Centennial Spirit and I did not provide them with my photograph."

Dennis King, treasurer of Friends for Scott McInnis, Inc., Mr. McInnis' campaign committee for the 1998 Congressional election, states that the committee "received no contribution, in cash or in-kind, from . . . Centennial Spirit, nor has it made any contribution, either in cash or in-kind, to Centennial Spirit." Mr. King also avers that the committee "has not cooperated with Centennial Spirit concerning," nor "requested or suggested that Centennial Spirit make any," disbursements. According to Mr. King, the committee "has no direct knowledge or information about the activities of Centennial Spirit complained about in the complaint."

In response to the complaint, the Campbell Victory Fund and Aaron Clark, as treasurer, submitted a one sentence letter stating, "In response to your letter regarding MUR 4840, we have

no connection with or knowledge about Centennial Spirit and know nothing about the piece of literature referenced in the complaint."

The response of the Bob Greenlee for Congress Committee and Clair Ann Beckmann, as treasurer, consists of a cover letter and two affidavits—one by campaign manager Sean Murphy and one by Clair Ann Beckmann. Murphy states that he was familiar with Centennial Spirit and has had "informal discussions on a personal level" with some persons involved in Centennial Spirit but has never had any involvement in their operations. Beckmann states that she was not familiar with Centennial Spirit prior to the notification letter that she received from the FEC on November 2, 1998 and has had no contact, no personal involvement with or knowledge of any persons who worked for Centennial Spirit. Furthermore, both affidavits contain statements that the photographs of Greenlee and his positions on the issues were publicly available and that they are not aware of any persons who might have provided such items to Centennial Spirit. Bob Schaffer for Congress and Arthur R. Willis II, as treasurer, responded with affidavits from Willis and from campaign manager Sean Walsh. Both affidavits are identical to Beckmann's affidavit above with only the names of the individuals and committees involved changed.

The response of Hefley for Congress and Fredrick R. Reynolds, as treasurer, consists of a letter from Reynolds stating that he has not had any correspondence with Centennial Spirit, "written or verbally," that they were not asked for and did not give permission to Centennial Spirit to publish anything on the campaign's behalf, and that they did not raise funds for or contribute to or receive funds from Centennial Spirit. The response of the Tancredio for Congress Committee and Raymond Gifford, as treasurer, consists of a letter and affidavit from Gifford that denies that Centennial Spirit ever expressly advocated Tancredio's election and that Tancredio for Congress neither benefited from any express advocacy by Centennial Spirit nor coordinated any

activities or expenditures with Centennial Spirit. Nancy McLanahan Goes to Congress and Janice C. Perkins, as treasurer, responded with a letter from Perkins which states that neither she nor the committee had any knowledge of the "independent expenditure in question..." and that their first knowledge of the mailer was when they received it in the mail prior to the election.

**D. Analysis**

**1. Express Advocacy, Coordination and Related Issues**

The Centennial Spirit mailer at issue here is a four-page mailer containing text and photographs, with an insert of four pages describing early voting by absentee ballot for the November 3<sup>rd</sup> election, early vote locations, and two pre-addressed absentee ballot application postcards which could be detached and mailed to County Clerks' offices. At the bottom of one of the pages of the insert appear the words, "*Paid for by Centennial Spirit, a Colorado non-profit corporation.*" The remainder of the mailer, not including the insert, will be the focus of this analysis.

When folded as a mailer, the outside cover page lists the return address of Centennial Spirit over the words, in bold print, "Time Sensitive Material-Open Immediately!" and, across the bottom, the phrase "COLORADO'S 1998 CANDIDATES." The back cover page states "VOTE EARLY NOW!" in large type and then, in smaller type, the words "DON'T LET EL NINO STOP YOU FROM VOTING ON NOVEMBER 3<sup>RD</sup>!" On the first interior page, are the words, again, "COLORADO'S 1998 CANDIDATES", under which appear the names and photographs of U.S. senatorial candidate Ben Nighthorse Campbell, and congressional candidates Nancy McClanahan, Bob Greenlee, Scott McInnis, Bob Schaffer, Joel Hefley and Tom Tancredo, as well as the candidates for Governor, Lieutenant Governor, Secretary of State, Attorney General, Treasurer and, without a photograph, Colorado University Regent at Large.

Despite the fact that these individuals constituted all the state-wide Republican candidates running in the general election, nowhere on the mailer are any of these candidates identified as Republicans. Moreover, no other candidates for those offices appear or are mentioned in the mailer, even though at least all the federal candidates had opponents.

On the facing interior page, in large bold print, are the words **"HERE IS WHAT THESE CANDIDATES STAND FOR:"** followed by seven listed phrases: "Smaller government; Local control of education; Protecting Social Security for our seniors; Reforming the Internal Revenue Service and our tax system; Responsible stewardship of natural resources; Increase resources to fight the influx of drug use in Colorado; [and] Equal opportunity for every individual." This list is followed by the words, in bold, **"Please make sure to Vote!"** A small but legible disclaimer appears at the bottom of this page which states, *"This mailer does not constitute an endorsement of any candidate."*

Based on the four corners of the mailer, it appears that the mailer contains express advocacy. The mailer exhorts readers to take electoral action: **"Please make sure to Vote!"** and **"VOTE EARLY NOW! Don't Let El Nino stop you from voting on November 3<sup>rd</sup>!"** Moreover, the electoral action advocated by Centennial Spirit is linked to the identified and pictured individuals—"Colorado's 1998 Candidates." The mailer directs the reader/voter's attention to seven catch-phrases but assigns no significance to those catch-phrases except that they are the positions of (and, implicitly, reasons to vote for) these clearly identified candidates in the upcoming election. The mailer's message, in effect, is **"HERE IS WHAT THESE CANDIDATES STAND FOR, their positions are so laudable that they alone are COLORADO'S 1998 CANDIDATES, now Please Make Sure to Vote."** Under such circumstances, the action

verbs contained in the exhortations to "Please make sure to Vote!" and "VOTE EARLY NOW!" are the functional equivalent of "vote for" these candidates.

The focus of the mailer is on clearly identified (with photos, names and offices they are running for) candidates, promoted as "COLORADO'S 1998 CANDIDATES," who also just happen to be all of the statewide Republican candidates up for election in 1998. There is no reference to the opponents of these identified candidates. The catch-phrases listed under "HERE IS WHAT THESE CANDIDATES STAND FOR" serve no real function except to identify the candidates with those catch-phrases for purposes of electoral action and the only action urged in the mailer is voting. Centennial Spirit implicitly acknowledges as much in its response when it says, "If a recipient disagreed with one or more of the points for which this mailer states the identified candidates stand, he or she likely would read the mailer as providing a reason to vote against the candidates."

The only arguable issue positions in the mailer, namely the catch-phrases, contain virtually none of the issue advocacy that *Buckley* sought to protect. There is certainly no issue advocacy contained within the catch-phrases themselves--no discussion of the pros and cons of the underlying issues. Furthermore, readers are not asked to engage in any issue advocacy themselves. No information is provided on how any of the candidates--listed or unlisted--might be contacted or influenced on the underlying issues. No information is provided on how to advance the mailer's issue agenda, except to vote for the candidates identified by the mailer as standing for these positions. Besides, most of the positions that the identified candidates purportedly "stand for" are phrased so broadly (e.g., "Protecting Social Security for our senior citizens", "Responsible stewardship of natural resources," "Equal opportunity for every

individual") that few readers/ voters are likely to "take issue" with them, anyway. They are simply a way for the authors to identify the listed candidates as laudable candidates.

The mailer does not set out a "discussion of issues that by their nature raise the names of certain politicians." *MCFL*, supra, at 249. To the contrary, it focuses on the advocacy of candidates, not issues. Even if Centennial Spirit's contention that "when read as a whole, [the mailer] is not susceptible of an interpretation that it is *only* an exhortation to vote for specific candidates" (emphasis added) is found to be not wholly inaccurate, the mailer clearly contains such an exhortation, and, therefore, express advocacy.

The Centennial Spirit mailer, in many ways, resembles the newsletter found to have contained express advocacy in *MCFL*. Neither publication contains any of the "magic word" phrases listed in *Buckley*. The *MCFL* newsletter set out the positions of all candidates, but highlighted and identified, by use of photographs, those candidates whose pro-life views were consistent with those of *MCFL*, and then urged voters to "VOTE PRO-LIFE!" Similarly, the Centennial Spirit mailer highlights a single group of candidates--"Colorado's 1998 Candidates"--links them to a set of positions which identify them as laudable candidates and then urges readers "Please make sure to vote." Thus, like the newsletter at issue in *MCFL*, the mailer in the instant case "goes beyond issue advocacy to express electoral advocacy." 479 U.S. at 249.<sup>9</sup> As in *MCFL*, the mailer "provides in effect an explicit directive: vote for" the candidates identified as "Colorado's 1998 Candidates." "The fact that the message is marginally less direct than 'vote for [these candidates]' does not change its essential nature." *Id.* That the mailer claims not to

<sup>9</sup> Indeed, unlike the Centennial Spirit mailer, the *MCFL* newsletter contained some issue advocacy to the extent that it set out the records of all the candidates, of both parties, and let the reader/voters engage in some comparative analysis. Centennial Spirit's mailer, in contrast, identifies by name and picture only Republican candidates, and presents no opportunity for analysis of competing views.



constitute an endorsement of any candidate can not insulate it from the fact that it expressly advocates the election of clearly-identified federal candidates. *Id.*

The conclusion that the Centennial Spirit mailer contains express advocacy is also supported by the *Christian Coalition* decision, *supra*, a case decided after the promulgation of 11 C.F.R. §100.22. The *Christian Coalition* court formulated a test for express advocacy based primarily upon the *Buckley* and *MCFL* decisions from the U.S. Supreme Court.

The Centennial Spirit mailer, like the Christian Coalition publication, is clearly directed at the "reader as voter." It "in effect contain[s] explicit directives," in the form of "action verbs or their functional equivalents,"--"Vote Early Now" on the cover page and "Please Make Sure to Vote" on the page containing the list under "Here's What These Candidates Stand For." In the context of the entire communication, the action verb "vote" in these phrases becomes the functional equivalent of "vote for" the clearly identified candidates.<sup>10</sup> As in *Christian Coalition*, no opponents of the clearly identified candidates are identified nor are their positions on the issues set forth. Just as Newt Gingrich was extolled as a Christian Coalition "100 percenter," the candidates in the Centennial Spirit mailer are linked to a single series of positions, cast in a favorable light, and deemed to be "Colorado's 1998 Candidates." While "marginally less direct" than saying "vote for these candidates," the mailer is in effect an explicit directive that because the identified candidates hold these positions, the readers should vote for them on November 3<sup>rd</sup>.

Centennial Spirit's statement in its response that readers of the mailer are left to vote for

<sup>10</sup> The *Christian Coalition* court also found that two other expenditures did not constitute "express advocacy" because, for different reasons, they did not contain an explicit exhortation to take electoral action. One expenditure was for travel expenses and compensation for Ralph Reed, the then-Executive Director of the Christian Coalition, for a speech in Montana in which he discussed a Democratic congressional candidate in negative terms, stating, among other things, "...victory will be ours" and "...we're going to see Pat Williams sent bags packing...in November..." but did not direct the audience to take any electoral action. The other expenditure was for a mailer called "Reclaim America", which included the Coalition's congressional scorecard and exhortations such as "stand together" and "get organized" but no exhortation to take electoral action.

the candidates if they like the listed positions and against them if they do not, not only acknowledges that the mailer is directed to readers as voters, but supports the proposition that, one way or another, it contains express advocacy under the standards set forth in 100.22(a) as well as in *MCFL*.<sup>11</sup> Therefore, it appears that Centennial Spirit's mailer represents an independent expenditure, unless the evidence shows that the expenditure was coordinated. Under the standards set out in *Christian Coalition*, however, there is insufficient evidence to show that the expenditures in connection with the mailer were coordinated.

As noted in the discussion of Centennial Spirit's response, *supra*, Donald Bain averred that he sent a memorandum dated September 10, 1998 to Centennial Spirit personnel stating that Centennial Spirit's "disbursements were not to be made in cooperation or consultation with any candidate or candidate committee." The sworn responses of Centennial Spirit, Mr. Bain, Mr. Hesse, and Ms. Meyer are all to the effect that Centennial Spirit's mailer was not prepared, paid for, or mailed in concert with, or at the request or suggestion of any candidate or candidate committee. The Complainant had indicated that its allegation of coordination rested in part on the presence of candidate photographs in the mailer. Congressman McInnis' sworn response states that he did not cooperate or consult with, or make requests or suggestions, to Centennial Spirit regarding its disbursements, and that he did not know his picture would appear in the mailer or supply his photograph. His campaign committee also denied any coordination with Centennial Spirit. The remainder of the committee respondents likewise either denied

<sup>11</sup> Since this Office believes that the Centennial Spirit mailer contains express advocacy under the standard set forth in 11 C.F.R. § 100.22(a), as well as *MCFL*, the Commission need not decide whether it meets the standards articulated by other courts or 11 C.F.R. § 100.22(b). Indeed, any communication that meets the standards of part (a) of the regulation would also meet part (b) of the regulation, although the reverse is not necessarily the case. As in *Furgatch*, *supra*, the mailer contains a "clear plea for action" on behalf of clearly identified candidates. *Id.* at 864. The action called for is unmistakably and unambiguously voting for the identified candidates on November 3<sup>rd</sup>. Reasonable minds could not differ as to whether it encourages voters to elect the identified candidates. *Id.* ; 11 C.F.R. § 100.22(b).

coordination with Centennial Spirit or any knowledge of Centennial Spirit prior to notification by the Commission.

The available evidence, including sworn statements, thus indicates that Centennial Spirit created and distributed the mailer on its own. Certainly, there is nothing in the mailer that would require the assistance of any candidate, since it takes no controversial issue positions, makes no special promises and passes on no information that would not be readily obvious to anyone in the general public and uses photographs which, respondents from the Greenlee and Schaffer campaigns specifically aver, are readily available to the public.

Without coordination, the expenditure for the mailer made by Centennial Spirit does not constitute a "contribution" for the purposes of the limits set out in the FECA sections alleged in the complaint. Therefore, this office recommends that the Commission find that there is no reason to believe that Centennial Spirit violated 2 U.S.C. §§ 441a(a)(1)(A) or 441a(f) in connection with the mailer or that any other respondent violated 2 U.S.C. § 441a(f).

## **2. Qualified Non-Profit Corporation and Related Issues**

Given that the Centennial Spirit mailer contained express advocacy, and appears to have been distributed to the general public, Centennial Spirit has violated 2 U.S.C. §441b by making a prohibited corporate expenditure unless it is a "qualified nonprofit corporation" within the meaning of 11 C.F.R. § 114.10.

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23-04-406-1231

Since the available evidence seems to suggest that Michael Hesse was only a contractor with Centennial Spirit, this office recommends that the Commission find no reason to believe that he or any respondent other than those referenced above violated 2 U.S.C. § 441b.

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23-04-406-1232

23-04-406-1233

Complainant also alleges that by accepting a gift of \$100,000, as reported in an October 21, 1998 Rocky Mountain News article attached to the complaint, Centennial Spirit violated 2 U.S.C. § 441a(a)(1)(C), which states that "[n]o person shall make contributions to any other political committee in any calendar year which, in the aggregate, exceed \$5,000." However, this statutory section deals with making contributions, not accepting them. Therefore, this office

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**IV. RECOMMENDATIONS**

- 1.
- 2.
3. Find no reason to believe that Centennial Spirit violated 2 U.S.C. §§441a(a)(1)(A), 441a(a)(1)(C) or 11 C.F.R. § 110.11(a)(5).
4. Find no reason to believe that Congressman Scott McInnis, Campbell Victory Fund and Arron L. Clark, as Treasurer, Bob Greenlee for Congress Committee and Clair Ann Beckmann, as Treasurer, Friends of Scott McInnis and Dennis King, as Treasurer, Bob Schaffer for Congress and Arthur R. Willis II, as Treasurer, Hefley for Congress and Fredrick R. Reynolds, as Treasurer, Tancredo for Congress Committee and Raymond Gifford, as Treasurer, or Nancy McClanahan Goes to Congress and Janice Perkins, as Treasurer violated 2 U.S.C. §§ 441a(f) or 441b.
5. Find no reason to believe that Mike Hesse violated the Act.

6.

7. Approve the appropriate letters.

Date

1/17/01

  
Lois G. Lerner  
Acting General Counsel